No. 94-203

In The

Supreme Court of the United States

October Term, 1994

FORTIS MORSE, KENNETH CURTIS BARTHOLOMEW AND KIMBERLY J. ENDERSON,

Appellants,

v.

REPUBLICAN PARTY OF VIRGINIA AND ALBEMARLE COUNTY REPUBLICAN COMMITTEE,

Appellees.

On Appeal From The United States District Court For The Western District Of Virginia

BRIEF *AMICUS CURIAE* OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether Virginia's Constitution or statutes "grant authority" to political parties to nominate candidates by convention so as to implicate § 5 of the Voting Rights Act.

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INTEREST OF *AMICUS CURIAE*

The Attorney General for the Commonwealth of Virginia respectfully submits this brief *amicus curiae*, on behalf of the Commonwealth of Virginia and its citizens, and in support of Appellees.

The Appellants and their *amici* purport to examine Virginia law and reach conclusions regarding the relative power and authority of the Commonwealth and its citizens. Appellants' characterization of state law is so flawed as to strike at the very foundation upon which

government in Virginia rests. A question as significant as the relationship between a state government and the citizenry must not be entrusted to the representations of the parties to a cause, each with their own purposes and interests, which are independent of the interests of the citizens of the state whose laws are implicated by their dispute. The interests of the citizens of the Commonwealth must be represented in this action because the legal issues raised thereby put their power and authority as citizens at risk. It is the duty of the Attorney General of Virginia to correct the interpretation of Virginia law offered by the Appellants. In so doing, it is his privilege to stand in defense of the traditional liberties and inherent rights of each and every citizen of the Commonwealth to participate in political activity and to gather together in political associations upon their own terms, with a minimum of interference from their governments. It is their natural and constitutional right to do so; it does not require any permission or grant of authority from the state.

SUMMARY OF ARGUMENT

The position of the Appellants is poised precariously upon the premise that Virginia's election laws *grant authority* to political parties, including the Republican Party of Virginia (hereinafter "RPV"), to select their candidates for public office at conventions.[1] Appellants' Br.,

[1] This supposed grant of authority is also relied upon by Appellants for satisfaction of the two part test which is provided by § 51.7 of the regulations governing application of the

at 11. What the government grants, the government may take away. Thus, Appellants' interpretation of state law is the very antithesis of the principles upon which the government of the Commonwealth was formed and upon which it is daily maintained.

All power in the Commonwealth is vested in and derived from the people. Va. Const. art. I, § 2.[2] The individual citizens of the Commonwealth retain their inherent authority to organize into groups which select from among themselves a candidate to promote for a public office. Va. Const. art. I, §§ 2, 3, 6 and 12.[3] To say that they are granted that authority by the state would be to say that the state has the power to deny them that authority. This is not the law of Virginia. The fundamental rights of all Virginians, to political association, expression and action, are neither obtained nor exercised by the

Voting Rights Act and which attempts to define the activities of political parties that are subject to the Act's preclearance requirements.

[2] "That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them." Va. Const. art. I, § 2.

[3] The protections and limitations established by article I of the Virginia Constitution are echoed by the Bill of Rights of the U.S. Constitution and the position taken herein on the basis of the former finds equal strength in the latter. However, it is the unique role of the Attorney General of Virginia to guard and defend the rights of Virginians as they are secured by provisions of the Virginia Constitution and as they are reflected in the laws of the Commonwealth. The constitutional protections afforded Virginians by their state constitution pre-date federal constitutional limitations on state action by more than a century.

grace of government. They reside independently of government in each and every citizen and they are expressly acknowledged and accommodated by Virginia's election laws.

Political parties in Virginia are not creatures of state government but voluntary associations of people who band together to advance their common views concerning the conduct of their government. Central to their task is the election of individuals who share their views to public office, an objective that typically leads political parties to choose individuals, who will seek election by the public at large, as representatives of the party and its views. Parties do not undertake these activities as the result of any license or grant of authority from state government. The authority to conduct these activities is an inherent right of the people. Like other exercises of free speech and assembly, the selection of candidates in Virginia may be subject to some limited degree of regulation by the state. However, it nonetheless remains an inherent right, not a matter of authority bestowed by the government.

Virginia's election law establishes procedures whereby political parties, groups and individuals, including "minor" parties, may have access to the ballot so as to place their candidates' names before the electorate. *See* Va. Code Ann. §§ 24.2-508 to -511, -500 to -504. Virginia law also lowers the threshold for inclusion on the general election ballot for the candidates of those groups meeting the statutory definition of "political party"; and it offers such groups access to the public electoral machinery if the group desires to delegate its power to nominate to a state-run primary. *See* Va. Code Ann. §§ 24.2-512 to -558. However, the reasonable functions of that lowered

threshold are (i) to require groups to demonstrate some minimal level of support from the electorate before they are permitted to require the expenditure of public resources through a state-sponsored primary and (ii) to protect the integrity of the political process from frivolous or fraudulent candidates. *Libertarian Party v. Davis*, 766 F.2d 865, 868 (4th Cir. 1985). These provisions of Virginia law, individually or in concert, do not and cannot transform the free exercise of inherent rights of Virginians into acts taken pursuant to a delegation of state authority.

Therefore, neither the RPV nor any other political party or group can be subjected to the preclearance requirements of § 5 of the Voting Rights Act when they conduct a convention to nominate candidates. The Justice Department's regulations do not allow it and the previous decisions of this Court do not support it.

ARGUMENT

Appellants seek to subject the decisions of political parties in Virginia, regarding what method they will employ to select a candidate to represent them in a general election, to the preclearance requirements of § 5 of the 1965 Voting Rights Act. Section 5 itself makes no mention of political parties. 42 U.S.C. § 1973(c) (1988). However, the Justice Department, in reliance on its interpretation of Congressional intent, has explained by regulation when the provisions of the preclearance provisions

of the Act are imposed on political parties. 28 C.F.R. § 51.7 (1993). Its regulations provide that

> Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5.

28 C.F.R. § 51.7 (1993). Under this regulation, two distinct conditions must be met in order for an activity by a political party to be subject to the preclearance requirement of § 5.[4] First the change must relate to a "public electoral function" of the party. Second, the party must be acting under "authority granted by the state." Among

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[4] A third requirement reflected in the regulation is that there must be a change affecting voting. "Voting" is a carefully defined term that includes "all action necessary to make a vote effective in primary, special or general election. . . . " 42 U.S.C. §1973(c)(1). The definition makes no mention of *convention* votes. This deliberate omission supports the view that Congress did not seek to make political activity subject to preclearance where it does not occur pursuant to a grant of state authority.

Appellants' errors is that they fail to acknowledge these as two separate criteria, but instead treat them as only one: state action. The distinction between the two is illustrated in the example used by the regulation. The example refers to "primary elections at which . . . delegates to party conventions . . . are chosen. . . . " *Id.* It does not refer to any other method for choosing delegates to party conventions, nor does it refer to the actual conventions themselves. Even if a party's decision to nominate its candidate at a party convention were, by some authority, deemed to be a "public electoral function,"[5] it does not necessarily follow that the second prong of the test is satisfied, *i.e.* that the party's authority to hold a convention was granted to it by the state. In arguing that the RPV violated the Voting Rights Act, Appellants and the Solicitor General take the position that the RPV, when it decided to nominate its candidate for the 1994 race for the United States Senate by party convention and when it decided to charge a fee to delegates to that convention, "act[ed] under authority explicitly or implicitly granted by" the state of Virginia. Appellants' Br. at 27; Brief of the United States, at 13. Appellants purport to locate the express delegation of authority which supports their position in §§ 24.2-509 to -511 of the Code of Virginia. Appellants' Br., at 27. This position depends upon a complete misapprehension of the source of political power in Virginia. Appellants also misapply the decisions of this Court in which actions of political parties have been

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[5] Only the most heinous of affronts to constitutional rights have justified to this Court so extreme an intrusion into the activities of political parties as Appellants seek. *See Terry v. Adams*, 345 U.S. 461 (1953).

treated as state action for purposes of applying constitutional restraints.

The Voting Rights Act is not applicable to the facts of this case because the RPV, in deciding how it would select its candidate for the United States Senate, did not act pursuant to a legislative grant of authority from the Commonwealth of Virginia, as required by § 51.7 of the regulations if preclearance requirements are to apply. The Party acted pursuant to the constitutionally guaranteed rights of association, free speech and political action of its members. Under § 51.7, primary elections – events necessarily dependent on state resources – are subject to the preclearance requirements of the Voting Rights Act. Functions which arise from the party's *inherent* power – such as the right to assemble in convention – are not. This distinction follows necessarily from the Court's analysis of the obvious tension that exists between the inherent functions of the political party, which are constitutionally protected, and those which are arguably subject to state regulation in certain carefully prescribed instances. The regulation identifies primaries at which parties select candidates as activities within the reach of the Voting Rights Act. Notably, it does not so identify party conventions.

I. THE AUTHORITY OF THE REPUBLICAN PARTY OF VIRGINIA TO NOMINATE CANDIDATES FOR PUBLIC OFFICE BY WHATEVER METHOD IT SELECTS DOES NOT FIND ITS SOURCE IN STATE LAW BUT IN THE INHERENT RIGHTS OF THE PEOPLE.

"[A]ll power is vested in, and consequently derived from, the people . . . . " Va. Const. art. I, § 2. Virginia's

Constitution is the embodiment of the delegation of authority, by the citizens of the Commonwealth, to their state government. *See Staples v. Gilmer*, 183 Va. 613, 622-25, 33 S.E.2d 49, 53 (1945). The provisions of Virginia's constitution, and the statutes enacted pursuant to the authority granted thereby, can be read only in the context of the reservation of rights set forth by the first article of that document.

Article I of Virginia's constitution explicitly reserves to the citizens of the Commonwealth the right to free elections. Va. Const. art. I, § 6.[6] Inherent in this right is the right of the people to associate together for the purpose of putting forward candidates for inclusion on the general election ballot; *i.e. to nominate candidates.* As significant, article I also explicitly reserves to the people the authority to reform, alter or abolish their government. Va. Const. art. I, § 3.[7] In addition to explicitly reserving

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[6] That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good. Va. Const. art. I, § 6.

[7] That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and, whenever any

certain rights to the citizens of the Commonwealth, Virginia's constitution reminds those who would understand our system of laws which is constructed thereby that all citizens of the Commonwealth have certain inherent rights which they cannot deprive themselves of by delegation, and that the enumeration of certain of those rights in article I is not intended to imply any limitation of them. Va. Const. art. I, § 17.[8] Read together, the foregoing constitutional provisions establish a framework for the operation of a state government that receives its limited power by delegation from the people and which has no power to usurp the inherent rights or authority of its citizens. Nowhere in the Virginia Constitution do the people surrender their right to organize themselves in support of particular political ideas, and to select and support candidates for public office whom they believe will promote those commonly held ideas. In fact, that authority is explicitly protected by the Virginia Constitution's guarantee of free elections and its express prohibition of any law which abridges the right of the people to assemble peaceably or to petition the government for the

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government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

Va. Const. art. 1, § 3.

[8] "The rights enumerated in this Bill of Rights shall not be construed to limit other rights of the people not therein expressed." Va. Const. art. I, § 17.

redress of grievances. Va. Const. art. I, § 12[9]; *See Mahan v. National Conservative Political Action Comm.*, 227 Va. 330, 152 S.E.2d 829 (1984).

Article II of Virginia's constitution provides for the protection and exercise of the people's right to vote. Section 4 of article II directs Virginia's state legislature to "provide for the nomination of candidates."[10] Va. Const. art. II, § 4. Contrary to Appellants' urging, this constitutional direction does not make nominations by political parties acts pursuant to a delegation of authority. It does not cede to the legislature the inherent power of the people to organize and offer candidates of the organization's choosing for inclusion on a general election ballot. When read in conjunction with the guarantee of free elections, this provision simply requires the government

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[9] That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble and to petition the government for the redress of grievances.

Va. Const. art. I, § 12.

[10] "The General Assembly shall provide for the nomination of candidates, shall regulate the time, place, manner, conduct, and administration of primary, general, and special elections, and shall have power to make any other law regulating elections not inconsistent with this Constitution." Va. Const. art. II, § 4.

to acknowledge and to facilitate the exercise of that inherent right.[11] It requires the government to provide terms upon which the citizens' exercise of their inherent rights will be recognized and incorporated by the government in its conduct of general elections.[12]

Sections 24.2-509 through 24.2-511 of the Virginia Code, the provisions of Virginia law mistakenly relied upon by Appellants to characterize the RPV as a state actor, merely provide order, method and predictability to the government's exercise of its duty to conduct free elections. They inform citizens of the conditions upon which their candidacies, or the candidates of any organization they may form, will be recognized by the public electoral process. The statutes achieve their purpose with minimum intrusion on the power of the individuals and any political parties they may form. They do not "delegate authority" to nominate candidates for public office. That authority does not reside in the legislature and, therefore, is not the legislature's to grant or deny. Contrary to the Appellants' allegation, Virginia law does not presume to "delegate" or grant authority to political parties, either explicitly or implicitly, to nominate candidates. It does not substantially regulate the performance

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[11] The ordinary meaning of the term "provide," as it was used by the drafters of Virginia's constitution, is to furnish, supply or equip; to take measures with due foresight; to arrange for; or to supply means of support. Webster's Unabridged Dictionary of the English Language 1157 (1st ed. 1989).

[12] Virginia Code sections 24.2-509 to -511, as well as §§ 24.2-500 to -504, §§ 24.2-505 to -507 and §§ 24.2-512 to -538, comprise the legislature's acts pursuant to the constitutional mandate of article II, § 4.

of the nomination function but leaves that power in the private hands of political organizations and their individual members.

The fact that political parties do not nominate their candidates under a grant of state authority is not changed by Va. Code Ann. § 24.2-509(B), as cited by Appellants. Appellants' Br., at 4 and 27. This statute, which allows an incumbent previously nominated by primary to demand a primary when he seeks re-nomination, does not grant authority to the *party*. It permits an incumbent to require something of his party if he chooses and it is a restriction on the First Amendment rights of the citizens who comprise the party. First Amendment analysis provides that the statute can survive strict scrutiny only if it is found to serve a "compelling state interest" and is "narrowly tailored to achieve its objective." *See Tashjian v. Republican Party*, 479 U.S. 208 (1986). Assuming *arguendo* that the statute passes these tests, it is, at best, a reasonable restriction on the inherent right of political parties to select their candidates freely. It does not grant political parties anything.[13]

A political party is generally defined as a body of persons voluntarily associated to promote certain views or principles with respect to government. Political parties have certain inherent functions, among which is the nomination of candidates for election to public office. Any regulation of that power is subject to strict constitutional limitations. *Tashjian*, 479 U.S. at 213 -14. *See Mahan*, 227

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[13] Section 24.2-509(B) of the Code of Virginia has not, at this writing, been put to the test of a constitutional challenge.

Va. 330, 152 S.E.2d 829; 1986-1987 Va. Att'y Gen. Ann. Rep. 204, 205. For certain limited purposes under Virginia's election laws, the term "political party" is given a more narrow and precise definition. Va. Code Ann. § 24.2-101. The use of the term is a limited reference to those organizations, comprised of citizens of the Commonwealth, "which, at either of the two preceding statewide general elections, received at least ten percent of the total vote cast for any statewide office filled in that election" and which have a state central committee and an office of elected state chairman both of which have been continually in existence for at least six months. Va. Code Ann. § 24.2-101. However, lest there be any argument that the statutory definition of the term somehow alters the inherent rights of political parties which meet that definition, Va. Code Ann. § 24.2-508 states that a political party, as defined by statute, retains those powers which are inherent in all political organizations, including the power to nominate candidates:

> Each political party shall have the power to (i) make its own rules and regulations, (ii) call conventions to proclaim a platform, ratify a nomination, or for any other purpose, (iii) provide for the nomination of its candidates, including the nomination of its candidates for office in case of any vacancy, (iv) provide for the nomination and election of its state, county, city, and district committees, and (v) perform all other functions inherent in political party organizations.

Va. Code Ann. § 24.2-508. If, as argued by Appellants, the protection offered by this provision is a *delegation* – rather than an *acknowledgment* – of authority to nominate candidates, then the legislature would not have used the phrase "functions *inherent* in political party organizations" (emphasis added). Moreover, if the statute were a delegation and not an acknowledgement, it would necessarily follow that *only* those organizations which meet the statutory definition of "party" have the power to nominate or to exercise any of the other rights listed in the statute. Such a limitation would violate the rights secured to the people by the Virginia Constitution and would be an anathema to the political process in the Commonwealth.

Pursuant to Virginia's election laws, *all* political parties, whether or not they meet the statutory definition, have the right to nominate candidates. *See Libertarian Party v. Davis*, 766 F.2d 865, 868-69 (4th Cir. 1985) (describing "the indulgent nature of Virginia's ballot access scheme . . . "), *cert. denied*, 475 U.S. 1013 (1986). The difference is in how their nominees come to be listed on the ballot. For parties meeting the statutory definition, ballot access is automatic. Other parties must obtain signatures on petitions for their candidates. The definition of "political party" works to establish a threshold which must be met by any political organization in order for it to have automatic access to the general election ballot and/or to request the state to conduct a primary election to nominate its candidate at public expense.[14]

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[14] Primary elections which make use of the state apparatus, organization and officials, and which are conducted at public expense, as well as being open to all voters (as primaries in Virginia are), may transform the candidate selection process

The notion that a "party" has some implicit public authority to "winnow" the field of potential candidates is at the crux of Appellants' justification for requiring the RPV to comply with the preclearance requirements of section 5 of the Voting Rights Act. Appellants' Br., at 20. However, there is nothing in the election laws of the Commonwealth that allows organizations which meet the statutory definition of "party" to narrow the field of potential candidates for the general election ballot. Virginia's general election ballot is not closed to those who fail to get the nomination they seek, where that nomination takes place at a convention.[15] It is a candidate's choice whether he or she will offer him or herself to Virginia voters at large, without seeking the support of a statutorily defined "party."[16] It is reserved to political parties to determine which of those individuals seeking their endorsement, and the benefit of their organization, they will support, but no political organization in the Commonwealth of Virginia, party or not, has the power

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into state action for purposes of federal regulation. However, the reasoning which supports that transformation does not support, in a similar way, the reach of federal law to activities of political parties, such as conventions, which are not administered by the state pursuant to express statutory authority.

[15] By contrast, the general election ballot is closed to those who fail to win a *primary* nomination. Va. Code Ann. § 24.2-520. This point further exhibits a distinction between state action as represented by the state's conduct of a primary and the lack of state action represented by a party's conduct of a convention.

[16] The independent candidacies of Marshall Coleman, a former Republican candidate for state-wide office, and of former Democratic Governor Douglas Wilder, in the 1994 race for the United States Senate, speak directly to the openness of Virginia's system in this regard.

to limit or narrow the general election field by virtue of holding a convention.

The Solicitor General admits that a political party has the power to determine the political positions it will advocate, its rules, and its day-to-day operations and that it has that power independent of its "state-delegated authority to place a candidate on the ballot." Br. of the United States, at 21. However, he fails to provide any meaningful distinction between the functions he concedes and a party's selection of a candidate at a convention. Indeed, to allege any distinction between a party's right to advocate positions and its right to nominate candidates is to misperceive the fundamental nature of American democracy. It is only through their right to nominate candidates that political parties can transform their ideas into action. A party that could adopt platforms but not nominate candidates would be a mere debating society. Under the Virginia Constitution, both of those rights are guaranteed to the citizens of all political parties. Section 24.2-508 repeats that protection for those parties that meet the statutory definition, so that no one can mistakenly believe that meeting the definition somehow transforms an association of private citizens into a creature of the state.

There is a critical distinction between a nomination that takes place by convention and one that takes place by primary. In a primary, the party uses state resources to make its selection, including the state's voting machines, polling places, officers of election and rules of procedure. The party has no inherent right to these resources. It may use them only because the state has granted them the authority to do so. Thus, for purposes of § 51.7 of the

Justice Department's regulations, party primaries are subject to the preclearance provisions of the Voting Rights Act. On the other hand, no group of citizens need await state permission to hold a convention or to decide among themselves who they will put forward as a candidate for election. All Virginians – indeed, all Americans – have this right, whether they are Republicans, Democrats, Socialist Workers, followers of Ross Perot or members of a local civic league. Because no grant of state authority is involved, the second prong of regulation § 51.7 is not met and preclearance is not required.

When the RPV decided to nominate its candidate for the United States Senate at a state convention, and when it determined that it would require payment of a delegate fee, it exercised the inherent authority of its members as citizens of the Commonwealth. The RPV did not "operat[e] under a grant of authority from the state." Where there is no explicit or implicit grant of authority by the state, the actions of a political party are not within the reach of the preclearance requirement of § 5 of the Voting Rights Act, even pursuant to the broad application given that law by the Justice Department's regulations. Therefore, the decision of the District Court, dismissing Appellants' action, must be affirmed.

II. THE DECISIONS OF THIS COURT DO NOT SUPPORT THE PROPOSITION THAT ACTION TAKEN BY A POLITICAL PARTY PURSUANT TO VA. CODE §§ 24.2-509 TO -511 CONSTITUTES STATE ACTION FOR THE PURPOSE OF APPLICATION OF THE VOTING RIGHTS ACT.

Appellants turn to this Court's early 15th Amendment jurisprudence to bolster their conclusion that Virginia law provides the necessary delegation of authority to render a political party a state actor for purposes of the preclearance requirements of the Voting Rights Act. Appellants' Br., at 11. They quote broad dicta, out of its factual context, from *Terry v. Adams*, 345 U.S. 461 (1963), *Smith v. Allwright*, 321 U.S. 649 (1944), and *United States v. Classic*, 313 U.S. 299 (1941), to persuade this Court that the party nomination activities conducted by "private organizations, like RPV," become state action by virtue of their function of narrowing the field of potential candidates. Appellants' Br., at 20. From that premise they argue that the preclearance provisions of the Voting Rights Act, which were enacted subsequent to the Court's decisions in those cases, were intended to reach decisions regarding conventions conducted by political parties. Appellants' Br., at 20. However, neither the facts nor the state laws which were at issue in *Classic*, *Smith* and *Terry* bear any similarities to the facts presented to the Court in this case. Without any remote resemblance between the facts of those cases and this one, Appellants' attempt to lend the force of 15th Amendment jurisprudence to their position must fail.

The Court's decision in *Classic* stands for the proposition that the Constitution authorizes Congress to regulate

primaries as well as general elections. *Smith*, 321 U.S. at 659. The Court explained in *Smith* that their determination in *Classic*, that the actions of the Democratic Party in Louisiana with regard to the conduct of primary elections were subject to federal regulation, was a conclusion drawn from their finding that the laws of Louisiana set up an electoral process in which the Democratic primary was an integral step in the general election process. *Id.*, at 660. The Court in *Smith* went on to find that the laws of Texas, like the laws of Louisiana, so controlled the activities of political parties that the challenged action by a political party in that state was the equivalent of action by the state. *Id.*, at 663. In both *Classic* and *Smith*, unlike this case, state law required political parties to nominate their candidates by means of a primary. *Classic*, 313 U.S. at 311; *Smith*, 321 U.S. at 662. However, *the determinative fact common to both those cases was that the candidate selection process at issue was found to predetermine the outcome of the general election. Classic*, 313 U.S. at 318; *Smith*, 321 U.S. at 664. The same cannot be said of the public electoral process in Virginia today, where voters enjoy a healthy, vigorous, competitive and open electoral process.[17] In

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[17] This competitiveness is amply demonstrated by the party affiliation of Virginia's major office-holders. Over the past 30 years, Virginia has elected 4 Republican Governors and 4 Democratic ones. The current Governor and Attorney General are Republicans; the Lt. Governor is a Democrat. One U.S. Senator is a Republican; the other is a Democrat. There are 5 Republican Congressmen and 6 Democratic ones, a change from previous years when Republicans held a majority of the state's Congressional seats. In the Virginia House of Delegates, there are 47 Republicans, 52 Democrats and one independent. In the State Senate, there are 18 Republicans and 22 Democrats.

Terry v. Adams, this Court reached beyond the state-required Democratic primary and found state action in the activities of a county political organization which held its own primary to determine who would run in the Democratic primary. *Terry*, at 475. However, the identification of state action in order to subject the Jaybird Party to constitutional limitation was the single element of the decision upon which a majority of the Court could not agree. Four separate opinions were published in *Terry*. Each of three opinions expressed a different view as to the factual premises which allowed the Court to ascribe public authority to private action so that they might subject activities of the Jaybird Party to the 15th Amendment. There can be no doubt that the Court's willingness to do so sprang from the fact that those activities were so fundamentally repugnant to the values embodied by, and the rights protected by, the United States Constitution.

In comparison to the state laws examined in *Classic*, *Smith* and *Terry*, Virginia's minimal procedural regulations governing the public electoral process do not approach the closed and state-controlled, single-party systems which this Court confronted in those cases. There is not, in this case, any activity which, like that in *Terry*, necessitates the Court's intrusion into what otherwise is protected as private political activity. *See Eu v. County Democratic Comm.*, 489 U.S. 214 (1989) (state law ban on primary endorsements by political parties and laws governing composition and governance of parties overturned as in violation of First and Fourteenth Amendments); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (holding unconstitutional a state statute that sought to

limit the body of registered voters which a party by its rules could permit to vote in its primaries); *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981) (upholding a party's right to refuse to seat delegates to its national convention who were selected pursuant to state law but in violation of party rules). Even if the authorities cited by Appellants could be construed to support a finding of "state action" in the RPV's decisions to hold a convention and charge a delegate fee, only the "public electoral function" prong of the two-prong test of § 51.7 of the regulations would be satisfied. Appellants would still have to establish that the party's actions were taken pursuant to a "grant of authority" from the Commonwealth. As explained by Part I of this Brief, this is a hurdle they cannot get over.

Appellants chose not to rely on the Voting Rights Act decisions of this Court as primary support for their position. This is so because, in thirty years, the Court has never held that the preclearance requirements of the Act apply to a political party conducting a convention to nominate a candidate for public office. The Voting Rights Act decisions of this Court, which are cited by *amici* in support of Appellants' position, without exception, extend the requirements of the Act where the actions complained of were taken by public officials executing their public duties. *See, e.g., NAACP v. Election Comm'n*, 470 U.S. 166 (1985) (actions of a county setting an election date deemed subject to the preclearance requirements of § 5 as alterations in voting procedures by state officials); *Board of Educ. v. White*, 439 U.S. 32 (1978) (county school board deemed a political subdivision for purposes of preclearance under the Voting Rights Act and required to

submit personnel policy, regarding leave taken by employees to run for public office, to the Attorney General in compliance with § 5 of the Act).

In District Court cases which have extended the reach of § 5 of the Voting Rights Act to activities of political parties, the courts have done so on the basis of state laws and electoral processes quite different from that which exists in Virginia. *Fortune v. Democratic Committee*, 598 F. Supp. 761 (E.D.N.Y. 1984); *MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972). In *Fortune*, action by a Democratic Party committee to change its rules regarding selection of its Executive Committee was subjected to the requirements of § 5. The Party was deemed to perform a "public electoral function" because New York law delegated to the Executive Committee of the Party the power to fill vacancies in nominations and to authorize non-party members to run as Democrats. *Fortune*, 598 F. Supp. at 765. However, these statutes were integrally related to an underlying requirement of New York Election Law § 6-110 that parties nominate their candidates by state-sponsored primary; a requirement that Virginia law does not adopt and that is constitutionally suspect in light of *Tashjian* and *Eu*. In *MacGuire*, the court extended the requirements of § 5 of the Voting Rights Act to a change in party rules which governed the election of delegates to national conventions. However, those delegates were elected by means of a primary. In fact, the court in *MacGuire* specifically distinguished the case where a primary election is involved, from the case where a party selects delegates by convention, and noted, "[T]he Act does not protect one's right to participate in local convention." *MacGuire*, 343 F. Supp. at 121 n.3. There is no precedent

for the application of the provisions of the Voting Rights Act to the activities of a political party in choosing a nominee by convention.

Political parties in Virginia are not creatures of the state, created by statute. The freedoms of association and speech are firmly rooted in the foundations of Virginia government and carefully guarded by its constitution and statutes. They include partisan political activity as they do the decisions of political organizations regarding the selection of candidates for public office. The selection and support of those candidates is a party's most critical function. It is the very essence of political expression or, as the Court stated in *Tashjian*, the "crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian*, 479 U.S. at 215. The right to nominate candidates for public office at a convention can no more be said to be exercised by the RPV pursuant to a grant of authority from the Commonwealth of Virginia than can a citizen's right to freedom of speech and association be described as being delegated by Congress. All are rights retained by the citizens of the Commonwealth pursuant to the terms of their constitution and are very carefully protected thereby and by the election laws of the Commonwealth. *Id.*

CONCLUSION

Appellants urge this Court to adopt a radical new expansion of the Voting Rights Act, based on a deeply flawed misunderstanding of Virginia law. The people of Virginia have *never* been forced to obtain permission from any government – whether their state government or the Department of Justice – before associating together at political conventions and choosing candidates for public office. There is no reason and no law which supports the imposition of so draconian a requirement now. For the foregoing reasons, the decision of the District Court, to dismiss Appellants' action, must be affirmed.

Respectfully submitted,

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